No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATION, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center)[1] is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting them. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The petitioner's letter consenting to the filing of *amicus* briefs has been filed with the Clerk of Court. Respondent consented to the filing of this *amicus* brief by email from counsel of record.

in cases that will affect small businesses. NFIB Legal Center submits this *amicus curiae* brief because the case presents a matter of importance to the small business community. Specifically, NFIB Legal Center intends to highlight the larger implications of this case for businesses who bring antitrust claims against anticompetitive public enterprise actors.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The state-action immunity is a limited and disfavored antitrust exemption singular in purpose: to respect state power to regulate as an act of government. Beyond its narrow exception, the federal antitrust laws remain supreme. When states or their non-sovereign subdivisions participate in the market, they must be subject to antitrust scrutiny just like other commercial actors.

The federal antitrust laws are the "Magna Carta of free enterprise" and are as important to the preservation of the interstate economy and economic liberty "as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). They "guarantee[] each and every business, no matter how small, [the] freedom to compete." *Id.*

This Court's jurisprudence has increasingly applied a functional approach to state-action immunity such that quasi-public market participants are subject

to antitrust scrutiny unless they can prove that the state as a sovereign has adopted and supervised their anticompetitive conduct. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1114 (2015). Formalistic designations of an entity as "public" no longer matter. *Id.*; *see also* Resp. Br. 5 (SRP is a "nominal public entity" under Arizona law despite being one of the nation's largest electric utilities).

Treating these same actors differently than other competitors for collateral order purposes would impermissibly require federal antitrust enforcement to yield to hypothetical effects on state interests asserted by self-interested market participants while they continue to harm competition, consumers, and competitors.

1. Underpinning the state-action immunity—a statutory interpretation of the Sherman Act—is a balance that recognizes both the supremacy of the federal antitrust laws and the states' residual power to regulate. The collateral order analysis necessarily must consider whether interlocutory review serves this singular value.

2. The state-action immunity respects state power to regulate as an act of government, but it should not exempt anticompetitive conduct undertaken as a commercial market participant. Market participants, public and private, are inherently self-interested. The state-action immunity test is designed to ensure they do not have the freedom to abuse

state law authority for their own interests to the detriment of consumers and competition.

3. Allowing interlocutory appeals of state-action immunity denials would require the federal antitrust laws to yield in the face of doubtful—even dubious—claims of immunity by self-interested market participants. The collateral order doctrine should not elevate the interests of market participants above the congressional policy of rigorous antitrust enforcement.

4. Indeed, interlocutory review would imperil fundamental values implicated by the state-action immunity: it will delay and deter antitrust enforcement. Interlocutory appeals of state-action immunity will substantially increase the duration and cost of antitrust litigation, during which some competitors will go out of business or run out of money. All but the most well-funded litigants—large companies like Tesla—will be deterred from litigation.

ARGUMENT

I. COLLATERAL REVIEW MUST SERVE THE VALUES IMPLICATED BY THE STATE-ACTION IMMUNITY DOCTRINE

The collateral order exception should not apply to orders denying state-action immunity because the state-action immunity is only concerned with the careful balance between federal antitrust enforcement and state sovereignty—it is not concerned with the

interests of market participants even when they are acting at state direction.

The State Action Immunity. The state-action immunity is not an immunity, but rather a function of statutory interpretation—a merits question—that limits the substantive reach of the federal antitrust laws: Congress did not intend to preclude states from exercising their own power by enacting the Sherman Act. It is grounded in the concept of dual federalism: it respects the plenary power of Congress to regulate interstate commerce without denying the residual regulatory power of the states. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) ("*Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace.").

It is strictly limited and disfavored. The states' "power to attain an end does not include the lesser power to negate the congressional judgment embodied by the Sherman Act." *N.C. Dental Exam'rs*, 135 S. Ct. at 1111; *see also Parker v. Brown*, 317 U.S. 341, 351 (1943) (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it"). That congressional judgment represents a century-long commitment to the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *N.C. Dental Exam'rs*, 135 S. Ct. at 1110. This Court thus employs a strict test—requiring both a clear state policy to displace competition and active state

supervision—to ensure that federal antitrust law yields only where it imposes an "impermissible burden on the States' power to *regulate*." *Id.*

Collateral Order Doctrine. To be eligible for collateral review, "the entire category to which a claim belongs" must meet the necessary—but not sufficient—condition that "some particular value of a high order" would evade review if not considered immediately. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-107 (2009).

Petitioner argues that this requirement is met by its "dignitary interest" and the effect litigation would have on its "ability to freely exercise [its] discretion." Pet'r Br. 31. Even if these were legitimate interests for *all* state-action immunity proponents to claim—and they are not—they are not the interests implicated by the state-action immunity.

II. STATE-ACTION IMMUNITY DENIALS TO MARKET PARTICIPANTS DO NOT IMPLICATE A HIGH-ORDER VALUE

A denial of the state-action immunity is eligible for collateral review only if the federalism value served by it would evade review (and where the other necessary elements of the doctrine are met). But that value is not implicated by giving a special route to early appellate review for a significant number of state-action immunity proponents (including the Petitioner in this case): commercial market participants.

Commercial Conduct Is Not Exempt. This Court's holdings have been consistent with the idea that the state-action immunity does not apply to market conduct. In *City of Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389, 391 (1978), the Court rejected an argument that the antitrust laws are intended to protect the public from only private abuses and not local government activity. "Every business enterprise public or private, operates its business in furtherance of its own goals." *Id.* at 403.

In *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 460 U.S. 150, 154 (1983), it again applied this reasoning in rejecting an argument that "state purchases for the purpose of competing with private enterprise" were exempt from the Sherman Act. In separating commercial activity from traditional government functions, the Court explained it "is too late in the day to suggest that Congress cannot regulate states under its Commerce Clause powers when they are engaged in proprietary activities." *Id.* at 154 n.6. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991), the Court reaffirmed that the federal antitrust laws apply "where the State acts not in a regulatory capacity but as a commercial participant in a given market."

The Supremacy Clause demands this limitation on the state-action immunity because the Commerce Clause assigns the power to regulate interstate commerce to Congress. *See United States v. California*, 297 U.S. 175, 184 (1936) ("The sovereign power of the states

is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.").

Nevertheless, the Court has not formally recognized a categorical market-participant exception to the state-action immunity. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013). It need not do so now: the collateral order analysis focuses on "the entire category" of state-action immunity cases. *Mohawk*, 558 U.S. at 106. The Court should hold that the collateral order doctrine does not apply because interlocutory review would, in some cases, inappropriately elevate the interests of market participants over the congressional policy of robust antitrust enforcement.

Market Participants Are Self-Interested. Petitioner, like many antitrust defendants who raise the state-action immunity, is a non-sovereign actor and a commercial market participant who claims to have acted under the auspices of state law. As this Court has repeatedly recognized, these actors are not a substitute for the state: they are inherently self-interested such that their "private anticompetitive motives [blend] in a way difficult even for [them] to discern." *N.C. Dental Exam'rs*, 135 S. Ct. at 1111. Under a functional analysis, their conduct is not lightly attributed to that of the state, as sovereign.

Petitioner claims that it has a dignitary interest in avoiding burdensome antitrust litigation that would affect its discretion to act freely. Pet'r Br. 31. That is fundamentally incongruent with this Court's state-action immunity cases.

In fact, the state-action immunity is intended to discourage market participants from acting in their own interests or freely exercising their discretion. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) ("[W]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.") (citation and internal quotations omitted); *see also N.C. Dental Exam'rs*, 135 S. Ct. at 1113 (*Ticor Title*'s reasoning applies to "any nonsovereign entity—public or private—controlled by active market participants"). It does not, under any circumstances, defer to them and their restraints. *See Ticor Title*, 504 U.S. at 633 ("Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.").

For these reasons, the federalism value that the state-action immunity serves is not implicated when it is denied to a market participant.

III. INTERLOCUTORY REVIEW WOULD IMPERIL A FUNDAMENTAL VALUE OF STATE-ACTION IMMUNITY

Robust antitrust enforcement is essential to the national policy in favor of competition. It should not take a back seat to a lengthy interlocutory appeal process at the outset of litigation. Delay of legitimate antitrust enforcement alone would frustrate this policy by deterring litigation against market participants

who abuse state authority for their own competitive advantage.

Many of the litigants who challenge this conduct are, like NFIB members, small businesses who may not be able to afford another year of anticompetitive conduct through the appellate process. When they seek to enforce the federal antitrust laws against public market participant defendants, they do so because their market challenge is already failing due to the defendants' anticompetitive conduct.

If interlocutory appeals become available to market participants denied state-action immunity, those entities will obtain a virtually automatic year-long stay by asserting it, even if there isn't a legitimate basis to do so. It will also increase the cost of already-expensive antitrust litigation.

Moreover, because state-action immunity cases sometimes implicate bars to damages claims, *see, e.g.*, The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, as it does here, the plaintiffs' bar typically isn't interested in taking them on a contingency arrangement. Thus, the typical plaintiffs to antitrust actions against public entities are the businesses affected enough to seek mostly injunctive relief. If applied here, the collateral order doctrine would create an effective get-out-of-jail-free card from antitrust scrutiny for a significant number of quasi-public perpetrators. It would, in fact, raise the barriers to lawsuit sufficiently high that only the richest challengers—large companies like Tesla—would protect competition

by seeking relief for antitrust injury. The others would likely just go out of business.

The Clayton Act does "not merely . . . provide private relief, but [serves] the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Through it, Congress expressed a policy that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). The policy is most effective where private antitrust litigation is "an ever-present threat to deter" anticompetitive conduct. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). This Court has thus rejected rules that would impede it. *Id.* (rejecting rule barring injunctive relief for mere threatened injury); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (discussing cases that rejected limitations on the policy).

"[T]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 547 (1983) (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957)). Interlocutory appeals would add an additional hurdle and substantially undermine the private enforcement that Congress relies upon to enforce federal competition policy. Some defendants whose immunity

denial is affirmed will get the benefit of a stay that allows them to continue their anticompetitive conduct at the expense of consumers and competition. That is a great cost to avoid speculative harm to state interests in cases where it is ultimately reversed.

"The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over" private anticompetitive conduct. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). Applying the collateral order exception to state-action immunity denials would, in many cases, require just that: "private regulation . . . designed to confer monopoly profits on [defendants who should be denied the state-action immunity] at the expense of the consuming public" will continue while litigation seeking to enjoin their conduct is paused pending an interlocutory appeal. *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1111 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting)).

CONCLUSION

For the foregoing reasons, the NFIB Small Business Legal Center urges the Court to hold that the collateral order exception to the final judgment rule does not apply to denials of the state-action immunity.

Respectfully submitted,

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